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Case No. 82-185

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

vs.

BOSTON CHAPTER, NAACP, ET AL.,
Respondent.

AMICUS BRIEF OF DETROIT POLICE OFFICERS ASSOCIATION FILED IN SUPPORT OF PETITIONERS' BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

WALTER S. NUSSBAUM, P.C.
333 W. Fort Street
Suite 2000
Detroit, Michigan 48226
(313) 964-4670

DONALD J. MOONEY, JR., Esq.
PAXTON & SEASONGOOD
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 352-6760

Counsel for Detroit Police
Officers Association

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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I. STATEMENT OF INTEREST

The Detroit Police Officers Association is the recognized bargaining agent for approximately 2,500 police officers of the City of Detroit, Michigan. The DPOA files this Amicus Brief to state its position on legal and constitutional issues of growing significance. DPOA contends that both Title VII and the Constitution prohibit layoff procedures, whether or not by order of a Federal Court, which circumvent lawfully adopted state seniority systems and target individual employees for termination based upon race, rather than seniority.

This Court must now resolve these issues in the context of the Boston Police and Fire Departments. The problems of

reductions in force, particularly in safety services, have become increasingly prevelant throughout the United States, particularly in those regions of the northeast and midwest hardest hit by unemployment, thinning populations, and a resulting drop in state and local revenues. These factors, along with reduced federal assistance to cities, have forced dozens of municipal governments to cut back public services in order to live within their means. Those service cuts often mean reductions in force, particularly in the personnel-intense area of safety services. As in Massachusetts, state laws in Michigan, Ohio and other states have traditionally protected veteran police and fire personnel through seniority systems built up on the "last hired, first fired" principle.

The decision of the Supreme Court in these consolidated cases may determine the fate of bona fide seniority systems for public employees throughout this nation. DPOA believes that the concept of seniority was protected by the Congress in the enactment of Title VII, and that any court order requiring an employee to forfeit vested rights gained under a bona fide seniority system because of his race violates the Fourteenth Amendment of the United States Constitution.

The particular distinction between the facts of these cases and other cases allowing "race conscious" remedies is that the "victims" of the remedy are readily identifiable individuals who, along with their families, will be subject to the economic burdens and social stigma of layoffs only because of their race.

In times of more than 10% unemployment, the burden of a layoff from a highly skilled and specialized job, such as firefighter or police officer, is particularly accute. It is a burden that is borne by the laid off public servant as well as his family. But when that burden is imposed not because of the employee's relative qualifications or seniority, but simply because of his race, the stigma becomes unreasonably burdensome and clearly violates constitutional standards set forth by Justice Powell in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) and a majority of this Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

A remedy which sets aside a lawfully adopted state seniority system simply to achieve (or preserve) racial balance also exceeds the scope of a federal court's authority under Title VII of the 1964 Civil Rights Act.

II. SUMMARY OF ARGUMENT

1. THE CONSTITUTION PROHIBITS THE JUDICIAL IMPOSITION OF RACIAL LAYOFF QUOTAS IN PLACE OF A BONA FIDE PUBLIC EMPLOYEE SENIORITY SYSTEM.

In his opinion in *Bakke*, Justice Powell articulated a standard of strict judicial scrutiny for "race conscious" remedies that prefer one race over another, based upon the equal protection clause of the Fourteenth Amendment. That standard of strict scrutiny was adopted by a majority of the Court in *Fullilove*.

The Fourteenth Amendment prohibits a judicial remedy requiring racial balance in public employee layoffs in place of a "last hired, first fired" seniority layoff system implemented under State law. Such a remedy may not survive strict judicial scrutiny where the identifiable and innocent "majority" employees are the subjects of a racial classification which causes them to lose their jobs. The abstract goal of preserving a racial balance is not a satisfactorily compelling government interest to justify such a racial classification under the Fourteenth Amendment.

2. TITLE VII DOES NOT SUPPORT A JUDICIAL REMEDY THAT UNNECESSARILY TRAMMELS THE INTERESTS OF INNOCENT EMPLOYEES BECAUSE OF THEIR RACE.

Congress specifically exempted *bona fide* seniority systems from challenge when it adopted Title VII. 42 U.S.C. § 2000e-2(h). Congress's intent in adopting Title VII was to provide equal *opportunity*, not to require racial balance. 42 U.S.C. § 2000e-2(j).

A judicial remedy adopted under Title VII which causes innocent employees to lose seniority rights, and their jobs, because of their race, in order to achieve or preserve a racial balance, exceeds the remedial powers allowed by Congress for the enforcement of Title VII.

III. ARGUMENT

1. THE CONSTITUTION PROHIBITS THE JUDICIAL IMPOSITION OF RACIAL LAYOFF QUOTAS IN PLACE OF A BONA FIDE PUBLIC EMPLOYEE SENIORITY SYSTEM.

The scope of a judicial remedy is limited by both the violation shown by the Plaintiffs, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), as well as the constitutional limits upon governmental power applicable to all branches of government.

As a matter of law, this Court may not find that the types of "last hired, first fired" seniority systems used throughout this nation by state or local government, either under state law or through collective bargaining agreements, is a tool of racial discrimination subject to judicial relief.

In these cases the remedy allowed is particularly inappropriate since (1) the white employees laid off out of seniority order, because of their race, were not shown to be participants in any scheme of racial discrimination, but are simply innocent victims of racial preference; and (2) the minority employees given preference from layoffs, despite lower seniority rights, have not been shown to be "victims" of past and specific acts of discrimination. In these cases, the Court of Appeals improperly acted to preserve a racial balance rather than to remedy specific acts of discrimination.

A. The Constitutional Standards for Race Conscious Remedies Have Been Set By Bakke and Fullilove.

Constitutional analysis used by a majority of this Court in a series of cases would suggest that the Fifth and Fourteenth Amendments do not allow the forfeiture of bona fide seniority rights simply to preserve a recial balance.

In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), this Court set aside a racial preference program for admissions to a state medical school. The key to the Court's decision appeared to be the ability of Bakke to show that the burden of the racial preference fell upon identifiable "majority" applicants, who were denied admission only because of their race.

As with the remedy approved by the Court of Appeals in this case, the racial preference adopted by the University of California was not designed to provide a remedy to specific victims of past discrimination, but rather was intended to encourage racial balance in order to satisfy more general social goals. Justice Powell, in his lead opinion, found that Title VI of the 1964 Civil Rights Act "must be held to prescribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 at 287. He then examined the historical development of Fourteenth Amendment's applicability to claims of racial or ethnic discrimination:

> "As the nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880) (Celtic Irishman) (dictum); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (Chinese); *Truax* v. *Raich*, 239 U.S. 33, 41 (1915) (Austrian resident aliens); *Korematsu*, *supra*, (Japanese); *Hernandes* v. *Texas*, 347 U.S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the court in *Yick Wo*, are 'universal in their application, to all persons within the territorial jur-

> isdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. 118 U.S. at 369."
>
> 438 U.S. at 292-93

In analyzing and rejecting the notion that racial classification, if "benign", may be made on behalf of a traditional racial minority, Justice Powell noted that:

> "The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments. As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which group would merit 'heightened judicial solicitude' and which would not."
>
> 438 U.S. at 295-296.

Of particular significance to the claims of Petitioners in this case was Justice Powell's focus upon the improper burden that "benign" racial classifications may have upon individual and innocent victims of such classifications:

> "[T]here is a measure of inequity in forcing innocent persons in Respondent's position to bear the burdens of redressing grievances not of their making."
>
> 438 at 298.

In the case of laid off but more senior "majority" public employees, the burden is clear and swift – the loss not only of seniority opportunities but of a *job*.

In rejecting the specific racial quota adopted in *Bakke*, Justice Powell distinguished a series of cases which have allowed courts to formulate "race conscious" remedies for proven constitutional violations. In those cases the following elements were shown:

(1) In school desegregation cases, such remedies were allowed because "[e]ach involved remedies for clearly determined constitutional violations. E.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)."; and

(2) "[T]he scope of the remedies was not permitted to exceed the extent of the violations. E.g., *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977)."; and

(3) In certain employment discrimination cases, race-conscious remedies were allowed, such as the award of retroactive seniority only to *"the victims of discrimination* – not just by society at large, but by the respondent in that case."; and

(4) Only where such an award was necessary " 'to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.' " citing *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976).

438 U.S. at 301-02.

In concluding that the *Bakke* quota violated the Fourteenth Amendment, Justice Powell applied strict judicial scrutiny to an inherently suspect racial classification stating that:

"Prefering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

438 U.S. at 307.

In the context of the "strict scrutiny" of an inherently suspect racial classification, the classification may be supported only by a "compelling" government interest. As stated in *In re Griffiths*, 413 U.S. 717, 721-722 (1973), the suspect classification may be justified only when a government agency

"show[s] that its purpose or interest is both constitutionally permissible and substantial, and that its use of

> the classification is 'necessary . . . to the accomplishment of its purpose or the safeguarding of its interest."

Justice Powell in *Bakke* noted that the Court had allowed racial classifications "at the expense of other innocent individuals" only upon "judicial, legislative, or administrative findings of constitutional or statutory violations." 538 U.S. at 307. Then the racial classification is allowable as a remedy because "the legal rights of the victims must be vindicated". 438 U.S. at 307. Even under those circumstances, "the remedial action usually remains subject to continuing oversight to *assure that it will work the least harm possible to other innocent persons competing for the benefit.*" 438 at 307. (Emphasis added.)

These constitutional limits upon race conscious remedies appear to have been adopted by a majority of this Court. In *Bakke*, the Chief Justice, along with Justices Stevens, Stewart, and Rehnquist, concluded that the University's Special Admissions Program violated Title VI of the Civil Rights Act of 1964 because of its racial exclusion of *Bakke*. Their opinion, written by Justice Stevens, specifically avoided reaching the constitutional issues.

In *Fullilove* v. *Krutznick*, 448 U.S. 448 (1980), the full court for the first time examined the *constitutionality* of a racial preference program (the minority set aside program adopted under the Public Works Employment Act of 1977, which required that 10% of that program's funds be expended through minority business enterprises). While the court held that the Act did not violate the Equal Protection concepts inherent in the Fifth Amendment, a majority of the court appears to adopt the "strict scrutiny" standard of Justice Powell in *Bakke* for the review of programs involving racial preference.

Chief Justice Berger, in an opinion joined by Justices White and Powell, noted that a program that employs racial or ethnic criteria, even in a remedial context, calls for a "most searching examination to make sure that it does not conflict

with constitutional guarantees". 448 at 491. In his separate opinion Justice Powell repeated the view he expressed in *Bakke* that strict scrutiny should be applied. Justice Powell perceived the Chief Justice's opinion as "substantially in accord" with his own views. 448 U.S. at 496.

The opinion of the Chief Justice, joined in by Justices White and Powell, as well as the separate opinion of Justice Powell suggest that the minority set aside program was permissible only because of its limited impact upon "non-minority" contractors. The Chief Justice held that the act was neither under-inclusive or over-inclusive, 448 U.S. at 485-90, and satisfied the standard of a narrowly tailored remedy designed to correct specific past discrimination identified by Congress. The Chief Justice specifically noted that the program was not constitutionally defective since the actual burden shouldered by the non-minority firms was relatively light, amounting to less than 2.5% of annual construction spending. 448 U.S. at 484.

Three other Justices dissented, applying an even stricter constitutional review. Justice Stewart, joined by Justice Rehnquist argued that *all* racial classifications are suspect in that the Equal Protection Laws prohibit *any* statutory classification based on race. 448 U.S. at 523-27. Justice Stevens found that the statute was unconstitutional because it could not be fairly characterized as a "narrowly tailored" racial classification designed to remedy a specifically demonstrated violation. 448 U.S. at 553. He argued that racial classifications are "simply too pernicious to permit any but the exact connection between justification and classification." 448 U.S. at 537.

An examination of *Bakke* and *Fullilove* would indicate that a majority of the Court has endorsed strict judicial scrutiny of racial preference remedies. *Fullilove* represents statements by at least six Justices rejecting race conscious "remedies" which cannot survive genuine strict judicial scrutiny.

B. The District Court's Remedy Fails the Test of Strict Judicial Scrutiny.

The analysis adopted by the First Circuit in this case simply fails to relate the extreme remedy of gutting a state's bona fide seniority system to any compelling government interest of remedying proven constitutional violations.

1. The actions which led to the newly modified consent decrees were commenced more than ten years ago. While those actions resulted in findings of disparate impact and statutory violations at the entry level, they did not result in findings of constitutional violations based upon proof of intentional discrimination by the City of Boston. In fact, the First Circuit specifically found that "intentional discrimination was not proved". 679 F.2d at 971.

2. The violations shown related to entry level discrimination. The remedy allowed after the initial trial and appeal did not include an award of retroactive seniority, as might have been allowed if individual victims of past discrimination had been able to show that such an award was required to remedy past discrimination. See *Franks* v. *Bowman*, *supra*. As a result, respondents cannot argue that the violations shown almost ten years ago at trial required an abrogation of seniority rights in 1981 to provide proper remedy to the plaintiffs.

3. The First Circuit has specifically found that "the relief sought originally was not for individuals, but to correct a condition of racial imbalance." 679 F.2d at 976. Yet the goal of correcting "racial imbalance" clearly falls beyond the permissible scope of racial classification described by Justice Powell in *Bakke*, 438 U.S. at 307, and by six justices in *Fullilove*.

4. Finally, the First Circuit has stated that "the proper test is one of reasonableness".[1] 679 F.2d at 977. Yet this appears to follow, at the very most, only the dissenting positions in

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[1] It also must be noted that the First Circuit seriously misinterpreted *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981); which it heavily relied

Bakke. The majority has clearly adopted the test of "strict scrutiny" which requires a finding not that the remedy imposed is "reasonable" but that it serves some compelling government interest.

5. The only specific reason for the abrogation of seniority rights articulated by the First Circuit was not the remedy of *specific* discrimination in the formulation of that system, but rather a more amorphous goal of "'effective crime prevention and solution'" which depends on "the public's support and cooperation which result only from public respect and confidence in the police". 679 F.2d at 977, quoting *Detroit*

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upon and at one point referred to as "the only circuit case directly on point" with regards to the constitutionality of the District Court's orders. In *Brown*, the Sixth Circuit affirmed a lower court decision enjoining the City of Toledo from laying off its firefighters on the basis of seniority. Toledo had entered into a consent decree requiring the implementation of an affirmative action plan with a five-year timetable and percentage goals. Layoff threatened to retard the progress which the City had made after seven years. The District Court enjoined the City from implementing a layoff plan that would have decreased minority representation. The Court of Appeals affirmed. Although Judge Brown wrote the majority opinion, the West Federal Reporter misleadingly describes his opinion as a concurring opinion and suggests that Judge Keith's opinion is the opinion of the court. As indicated in the Slip Opinion, Judge Keith delivered the Court's *judgment* and an opinion. *Brown* v. *Neeb*, Nos. 80-3468, 80-3476, Slip Op. at 1 (6th Cir. March 3, 1981). In his opinion, Judge Keith argued that the lower court's injunction compelled representational layoffs. 644 F.2d at 563-64. The Slip Opinion also noted that Judge Brown delivered a separate opinion in which Judge Wiseman, the third Judge on the panel, joined. Slip Op. at 1. Judge Brown disassociated himself from Keith's views regarding representational layoffs, noting that such layoffs would violate the collective bargaining agreement and Ohio law. 644 F.2d at 565-66. Thus, a majority of the Court affirmed the lower court's injunction and forced the parties to consider layoff's alternatives other than representational layoffs. Note, Alternatives to Seniority Based Layoffs, Reconciling *Teamsters*, *Weber* and the Goal of Equal Employment Opportunity, 15 U. Mich. J.L. Ref. — (1982).

Police Officer's Association v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979). Yet the court cites no substantive evidence linking these admirable goals to the necessity of laying off non-minority police officers out of the normal order of seniority. Justice Powell found that, to support a racial classification "a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination." 438 U.S. at 309, citing *Califano* v. *Webster*, 430 U.S. at 316-321. The record does not contain adequate proof linking effective crime prevention to the specific remedy of a racial classification in layoffs.

The Equal Protection Clause commands *the elimination* of racial barriers, not the creation of barriers to satisfy someone's theory as to how society ought to be organized. *DeFunis* v. *Odegarrd*, 416 U.S. 312 (1974) (Douglas dissenting). The District Court's use of racial preference to set aside a lawfully adopted and racially neutral seniority system adopted by the State of Massachusetts violates "the Equal Protection component of the Due Process Clause of the Fifth Amendment". *Fullilove* v. *Klutznick*, 448 U.S. at 473. To the extent that the layoffs were implemented by local government authorities, whether or not under order of the District Court, the use of the racial preference violated the Equal Protection Clause of the Fourteenth Amendment.

2. TITLE VII DOES NOT SUPPORT A REMEDY WHICH UNNECESSARILY TRAMMELS THE INTERESTS OF INNOCENT EMPLOYEES BECAUSE OF THEIR RACE.

Both Congress and this Court have clearly restricted the ability of the courts or employers to set aside bond fide seniority systems for the sake of preserving racial balance. Both the Congress and this Court have been guided by principles of fairness which must protect innocent employees from job loss on account of their race.

The District Court in these cases has based its modified

consent decree, at least in part, upon its power to remedy employment discrimination under Title VII. Yet Congress has placed limits on Title VII which should prohibit the unnecessary denial of a bona fide seniority rights to innocent employees because of their race.

Section 703(j) of Title VII provides that Title VII does not require an employer "to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race . . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community, state, section, or other country." 42 U.S.C. § 2000e-2(i).

In this case, the First Circuit dwelt not upon the specific need to remedy individual victims of past employment discrimination, but rather upon the apparent desire of the Court to reffect on the police force the racial composition of the community. The concern of the First Circuit apparently was that "the public safety department of a city reffect its growing minority population", 679 F.2d at 977, rather than that specific victims of past discrimination be made whole.

Section 703(a) of the Act (42 U.S.C. § 2000e-2(h)) also indicates congressional intent to protect the function of bona fide seniority systems:

> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system. . ."

Neither the District Court nor the Court of Appeals found that Massachusetts' "last hired, first fired" layoff system was anything less than bona fide.

In *Teamsters* v. *United States*, 431 U.S. 324 (1977), this

Court found that Section 703(h) protects bona fide seniority systems, even if they unintentionally perpetuate pre-Act discrimination.[2] In *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), the Court allowed a remedy which awarded certain retroactive seniority rights to *identified victims* of past discrimination. Yet even in that case Justice Powell recognized the danger of tampering with a bona fide seniority system when the rights of innocent parties are placed in jeopardy:

> "[C]ompetitive seniority benefits, as the term implies, directly implicate the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged – sometimes to the extent of losing their jobs entirely – are not the wrongdoers who have no claim to the chancellor's conscience, but rather are innocent third parties."
>
> 424 U.S. at 788-89 (Opinion by Powell, J., concurring in part and dissenting in part).

The First Circuit attempted to discount the rights and expectancies of white employees "who have been innocent themselves of any discrimination [but] will lose their jobs, at least temporarily." 679 F.2d at 977. The First Circuit stated that "white as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics and that a last hired, first fired seniority system perpetuates the past exclusion of minorities." 679 F.2d at 977.

Justice Powell specifically rejected this logic in his opinion in *Franks*:

> "Some commentators have suggested that the expectations of incumbents somehow may be illegitimate because they result in past discrimination against others. Such rea-

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[2] Title VII was applied to public employers in 1972. 42 U.S.C. § 2000e(a)(f).

soning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance."

424 U.S. at 788-89, n.7. (Citations omitted).

In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the court upheld a racial quota voluntarily negotiated between a *private* employer and a labor union, which set aside certain slots in a job training program for minority employees. In Justice Brennan's opinion for the majority, he noted that a key factor in winning the Court's approval was that "the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees." 443 U.S. at 208.

In this case the First Circuit admitted that after the city's layoffs were imposed in order of seniority, the District Court ordered the discharge of certain white employees and their replacement by previously laid off minority employees. 679 F.2d at 977, n.14. As such, the District Court's order unnecessarily trammeled the rights of the more senior white employees, resulting in their discharge. Certainly *Weber* does not support plaintiffs' claim that Title VII permits this extreme remedy.

This Court has never ruled on the permissibility of racial quotas imposed on or by public employers with regard to promotional or other seniority rights. Yet several circuit courts have restricted such quotas, where not shown as necessary to remedy specific victims of past promotional discrimination. In *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973), *cert. den.*, 421 U.S. 991 (1975), black patrolmen sought to restrain the City's

discriminatory employment practices. The district court imposed hiring and promotional quotas. The Second Circuit, in reversing the promotional quota, noted the effect on innocent white employees:

> "[T]he imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes. . . . We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted."
>
> 482 F.2d at 1341. (Citations omitted).

In *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *cert. den.*, 429 U.S. 823 (1976), the Second Circuit again refused to affirm a promotional quota which denied promotions to law enforcement officers solely because of their race:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. The quota placed upon a small number of readily identifiable candidates for a promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in the competitive examination, some of them may be bypassed for advancement solely because they are white." 520 F.2d at 429.

When a promotional quota is applied to public employee layoffs, the employees' job, not simply his promotion, is at stake. Certainly the considerations outlined by the Second Circuit in *Bridgeport Guardians, Inc.* and *Kirkland* are even more significant when seen in the context of layoffs. *See also White* v. *Carolina Paper Board Corporation*, 564 F.2d 1073 (4th Cir. 1977).

The Court's opinion in *Ford Motor Company* v. *EEOC*,

102 S. Ct. 3057 (1982), appears to focus upon the same rights which Petitioners in this case assert: the rights of innocent employees who may be victimized by race conscious remedies. In *Ford* the court rejected a rule adopted by the district court which prohibited the tolling of accrued back pay when an employer charged with violating Title VII unconditionally offered a claimant the job previously denied. The question was whether or not an employer was required to offer the claimant seniority retroactive to the date of the alleged discrimination, despite a previous and unaccepted offer of employment. In her opinion for the Court, Judge O'Connor stated that the rejected rule

> "threatens the interests of other, innocent employees by disrupting the established seniority heirarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority."
>
> 102 S. Ct. at 3070.

Congress did not intend by the adoption of Title VII to disrupt bona fide seniority systems, including layoff procedures implemented in order of seniority. Nor did Congress intend to allow racial preferences in layoffs in order to achieve or preserve a racial balance, particularly where the preferred employees have not been shown to be the victims of specific acts of discrimination. This Court must set aside judicial remedies adopted under Title VII which exceed Congress' clear intent in adopting that statute.

IV. CONCLUSION

Public employee layoffs never seem to occur without difficult public debate, particularly when police and fire personnel and the services they provide are cut. Our cities need not be burdened by a second and rankerous level of public debate on the issue of racial preference and quotas.

The "last hired, first fired" concept is based upon long experience and tradition, and has been implemented through

racially neutral laws adopted by the states and their local governments. It provides an orderly and sensible method of dealing with difficult community and political problems.

Judicial tampering with seniority order layoffs in the name of racial balance creates division and disorder. It separates public employees by race. It can destroy the morale of public employees and the confidence of the public. More significantly – race discrimination in the context of layoffs victimizes and stigmatizes innocent and dedicated public employees solely because of their race. This burden placed on the victims of racial balance is wholly contrary to the traditions of equal treatment and opportunity embodied in our Constitution and expressed by Congress in Title VII.

This Court must announce a firm standard which is consistent with the plain language of the Fourteenth Amendment and with Title VII, and which clearly indicates that the goal of racial balance does not justify the type of racial discrimination against innocent and identifiable individuals which is expressly prohibited by our Constitution and Title VII.

Respectfully submitted,

WALTER S. NUSSBAUM, P.C.
333 W. Fort Street
Suite 2000
Detroit, Michigan 48226
(313) 964-4670

DONALD J. MOONEY, JR.
1700 Central Ttrust Tower
Cincinnati, Ohio 45202
(513) 352-6760

COUNSEL FOR AMICUS
DETROIT POLICE OFFICERS
ASSOCIATION

OF COUNSEL:

TED MARTIN
PAXTON & SEASONGOOD
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 352-6700